

FILED
STATE OF ALASKA
APPELLATE COURT

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

2022 MAY 11 4:37
CLERK / APPELLATE COURT
BY _____

STATE OF ALASKA,

Plaintiff,

vs.

ZACHARY ALAN WHISENHUNT,

Defendant.

A-13240
F.P. in 5-5-22

Case No. 4FA-16-872 CR

**DECISION AFTER REMAND CLARIFYING DENIAL
OF DEFENDANT'S MOTION FOR NEW TRIAL**

This decision supplements and clarifies the trial court's April 17, 2018, Decision and Order Denying Motion for Judgment of Acquittal or New Trial.

After the jury issued a guilty verdict in Zachary Alan Whisenhunt's trial for the murder of Janessa Kempski, the defendant filed a combined motion for a judgment of acquittal and motion for a new trial. This court denied the new trial motion concluding that "the evidence was insufficient to prove the case beyond a reasonable doubt." In response to defendant's appeal, the Court of Appeals directed this court to clarify its decision denying Whisenhunt's motion for a new trial citing *Phornsavanh v. State*.¹

Standard to Grant New Trial

Alaska Criminal Rule 33 authorizes a trial court to grant a motion for a new trial "in the interest of justice" if the trial court finds that the jury's verdict is contrary to the weight of the evidence.² "When a trial court rules on a motion for a new trial, it sits as a metaphorical

¹ *Whisenhunt v. State*, 2021 WL 5108493, at 13-15 (Alaska App., 2021); *Phornsavanh v. State* 481 P.3d 1145, 1157-59 (Alaska App. 2021).

² *Phornsavanh* at 1158 citing *Hunter v. Philip Morris USA Inc.*, 364 P.3d 439, 447 (Alaska 2015).

‘thirteenth juror,’ independently weighing the evidence and evaluating for itself the credibility of the witnesses.”³ Mere disagreement with the jury’s verdict is insufficient to invalidate a verdict.⁴ A grant of a new trial “should be exercised ‘when necessary to prevent injustice,’⁵ but it is otherwise intended to be used ‘sparingly and with caution.’”⁶ “A jury verdict is not to be overturned lightly.”⁷ “Appellate intervention is reserved for situations in which ‘evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust.’”⁸ The standard trial courts use to evaluate motions for new trials is much more dedicated to [the trial court’s] discretion.”⁸ When ruling on a motion for new trial, a trial court must “[exercise] its broad discretion to determine whether the totality of the circumstances [warrants] a new trial in the interest of justice.”

In its remand decision, the appellate court stated a trial court must take a “personal view of the evidence” and independently weigh the evidence. The trial court must then “use its discretion to determine whether a verdict is against the weight of the evidence — not merely whether the trial court disagrees with the verdict — and whether a new trial is necessary ‘in the interest of justice,’ that is, ‘to prevent injustice.’”⁹

Based upon weighing the evidence as the 13th juror, the court’s view is that the jury’s verdict was not against the weight of the evidence and a new trial is not necessary to prevent injustice, even though the trial court personally concluded the evidence at trial did not prove beyond a reasonable doubt the defendant committed the murder.

³ *Phornsavanh* at 1158 citing *Hunter v. Philip Morris USA Inc.*, 364 P.3d 439, 448 (Alaska 2015).

⁴ *Id.*

⁵ *Id.* at 1158 citing *Hunter*, 364 P.3d at 448.

⁶ *Id.* at 1158 (citations omitted).

⁷ *Id.* at 1158 citing *Hunter*, 364 P.3d at 448.

⁸ *Hunter* at 449 citing *Hogg v. Raven Contractors, Inc.* *Hogg v. Raven Contractors, Inc.*, 134 P.3d 349, 352 (Alaska 2006) and *Kava v. Am. Honda Motor Co.*, 48 P.3d 1170, 1173 (Alaska 2002).

⁹ *Whisenhunt* at 14.

Proof Beyond a Reasonable Doubt Requirement

Jury Instruction A-6 explains the term “reasonable doubt.” A juror must presume a defendant to be innocent of all crimes charged. The prosecution always has the complete burden of proving the defendant guilty beyond a reasonable doubt. Expecting that an accused will provide an explanation of what happened is a typical and reasonable human reaction when assigning responsibility for an act. But, when an accused is accused of a crime and elects to not testify, a trial juror may not consider whether a defendant “told his side of the story” in the determination of guilt or innocence. Consequently, a juror must always keep in mind that the burden never shifts to the defendant.

A reasonable doubt can be based on the evidence presented or on a lack of evidence presented at trial. If there is reasonable doubt as to the defendant’s guilt, a juror *must* give the defendant the benefit of that doubt and find him not guilty. Put another way, if there is a reasonable uncertainty of guilt, based on the evidence presented, a defendant may not be convicted.

State’s Case

The essence of the State’s case was:

- (i) Kempiski’s body was left undiscovered in a rural area exposed to the elements for 10 days impairing the ability of the authorities to obtain evidence.
- (ii) Whisenhunt and Kempiski were both at a Fairbanks Holiday convenience store and gas station at approximately 1:30 a.m. on October 23, 2014, which is the last evidence of Kempiski being alive.
- (iii) Kempiski was likely killed in the early morning hours of October 23.

- (iv) The cell phone location evidence places Whisenhunt's phone within the cell tower sector where the body was found between for about 45 minutes between 3 a.m. and 4 a.m. on October 23 when Kempinski was likely murdered.¹⁰
- (v) Based upon the cell phone data, there was about 45 minutes of no cell phone usage by Whisenhunt in the early morning hours of October 23 about the time it appears Kempinski was killed.
- (vi) Whisenhunt's DNA was found under her fingernails.
- (vii) Whisenhunt's semen was located on the belt she was wearing the night she was murdered.
- (viii) Law enforcement concluded that only Whisenhunt reported blunt force injury by foot stomping to Kempinski's face and neck.
- (ix) Whisenhunt falsely claimed he never met Kempinski.¹¹
- (x) Whisenhunt was walking a fine line trying to convince investigators that he knew facts about Kempinski's murder but did not commit it himself. In other words, Whisenhunt committed the murder, but he was trying to convince investigators he knew important and confidential facts about the murder, but he did not commit it.
- (xi) Isaac Horman, who had a relationship with Kempinski and was an alternate suspect proffered by Whisenhunt, was excluded as a contributor to the DNA deposited under Kempinski's left-hand fingernail and from her tank top.¹²
- (xii) Isaac Horman could not have committed the murder because, based upon the cell tower records, Horman did not go to area where body was found and the Horman's semen deposit was explained by his romantic relationship with Kempinski.

¹⁰ The State submitted a multitude of exhibits relating to cell phone location. Exhibits 137 and 138 and the testimony associated with those exhibits is consistent with Whisenhunt being at or in vicinity of the Holiday store. The state's theory is that Whisenhunt committed the murder between 2:33 a.m. and 3:17 p.m. based upon the cell phone locational data. Exhibits 141-148, showing "tower hits" from 2:33 a.m. to 3:29 a.m. is consistent with being in cell phone sector where Kempinski's body was found. Exhibit 151 was a NELOS hit showing the phone was in the vicinity of Brock Road and Peede Road at 3:36.¹⁰ At 3:53 a.m. Whisenhunt's cell phone was in contact with cell towers consistent with the defendant returning to Fairbanks.

¹¹ Feb. 7, 2015, audio clip of interview between Bressler and Whisenhunt. Ex. 191.

¹² Derek Cutler testimony on August 3 at 12:11-12:12.

Whisenhunt's Case

As noted, Whisenhunt offered Isaac Horman as an alternate suspect at trial. Whisenhunt attacked the circumstantial nature of the State's case, concluding the lack of specificity in the evidence along with the evidence tending to show Isaac Horman's motive and opportunity creates a reasonable doubt about Whisenhunt's guilt:

- (i) Insufficient evidence existed to prove the time of Kempski's death, the cause of Kempski's death, or the location of the murder.
- (ii) Isaac Horman had a romantic relationship with Kempski.
- (iii) Witness Peter Clark, Horman, and Kempski stayed overnight at Clark's house on October 21 until the morning of the 22nd. Kempski was likely murdered within the next 24 hours. Clark heard them argue. During the quarrel, Horman called Kempski a "piece of shit" and he "should just kill her."¹³ Kempski left saying she was going to her mother's house.
- (iv) Horman did not call Kempski's mother after Kempski went missing though he had stayed overnight at Kempski's mother's house just a day before Janessa went missing.¹⁴
- (v) The cell phone data had gaps in it likely sufficient to allow Horman to travel to North Pole and back to dispose of the body.¹⁵
- (vi) Investigators focused on one of three phones Horman owned. Horman could have used one of his other two known phones investigators were aware of or even a different phone on October 23 as investigators did not know if he had other phones.¹⁶
- (vii) Horman deleted phone calls made prior to November 5 from his phone.¹⁷ One call deleted, among others, was a call on October 21 at 11:30 pm to Kempski.¹⁸

¹³ Testimony of Peter Clark on August 14, 2017, at 9:10 am.

¹⁴ Testimony of Shirley Kempski on August 11, 2017, at 9:08-9:18.

¹⁵ Testimony of Robert Bressler on August 9, 2017, on August 9, 2017, at 10:34 -10:42.

¹⁶ Testimony of Robert Bressler on August 9, 2017, on August 9, 2017, at 10:40-10:43.

¹⁷ Testimony of Robert Bressler on August 9, 2017, on August 9, 2017, at 11:11 -11:14.

¹⁸ Testimony of Robert Bressler on August 9, 2017, on August 9, 2017, at 10:46.-10:51.

- (viii) Bressler relied on Horman's statement that Horman only used his "279" phone at all times relevant to the investigation.¹⁹
- (ix) The investigation assumed that the location of Horman's "279" phone at his residence meant Horman was there also.
- (x) In November 2014, Horman told Bressler he was not in North Pole for months when the cell tower data revealed his phone pinging off the Bradway cell tower.²⁰
- (xi) After Whisenhunt became the focus of the then two-year investigation in 2016, it appears law enforcement discounted information that reasonably warranted further investigation. For example, Investigator Bressler discounted the value of Horman's statement that he had not been in North Pole for months when cell tower data showed his cell phone pinged off the Bradway Road tower. Bressler testified that because of the ambiguity in his question ("When did you last go to North Pole?" and Horman responded "Not for months"), Horman could have been thinking North Pole "proper" and Horman could have reasonably excluded trips when he traveled near North Pole.²¹ This is a poor excuse to not follow-up on Horman's Bradway Road cell tower ping. So, this potentially valuable information did not appear to get the review warranted.
- (xii) Whisenhunt's statements to the investigators reasonably could have been based upon the many rumors at FCC precipitated by the disclosure of photos of the body to inmates and the inmates desire to be rewarded by an early release from FCC for assisting in the investigation.
- (xiii) In 2016, Whisenhunt retracted the statements stating he obtained the information from rumors in the jail.²² Bressler testified that Whisenhunt advised that he had made the disclosure to obtain "a deal on a probation case."²³
- (xiv) Bressler testified that during that time law enforcement did not disclose details that Whisenhunt spoke about.

¹⁹ Testimony of Robert Bressler on August 9, 2017, on August 9, 2017, at 10:42-10:43; 10:54-10:56.

²⁰ Testimony of Robert Bressler on August 9, 2017, on August 9, 2017, at 10:53-10:56.

²¹ Testimony of Robert Bressler on August 9, 2017, on August 9, 2017, at 10:53-10:56.

²² Bressler testimony on Aug. 8 at 12:52.

²³ Bressler testimony on Aug. 8 at 12:52-53.

- (xv) The cell phone tower data is not information that can identify the specific location of cell phones.
- (xvi) Whisenhunt remained at the Holiday store long enough for the victim to perform fellatio on Whisenhunt.
- (xvii) Out of a total of three contributors, Horman's semen was detected in Kempski's vagina.²⁴ The other two contributors could not be identified. And Whisenhunt was excluded as a DNA contributor. The other two male contributors were unknown.
- (xviii) The sperm analysis cannot tell how long ago the sperm was deposited.²⁵ This is important because if the investigation cannot determine when the sperm was deposited, then Horman and the other two unknown contributors are at least persons-of-interest in the investigation since the deposit of the sperm could have been near the time of death, likely the morning of October 23.

Weighing the Evidence

As stated by the appellate court, “[o]n remand, the court shall clarify why, after independently weighing the evidence, it found that the evidence was ‘insufficient.’ And the court shall further clarify whether, given that apparent insufficiency, a retrial is needed in the ‘interest of justice.’”²⁶

Like many criminal cases, inferences drawn from direct and circumstantial evidence constituted much of the prosecution's case. Inferences from evidence are often susceptible to differing interpretations. If an element of a crime is inferred from evidence admitted at trial and the evidence is reasonably susceptible to two meanings, then the proponent's case may be materially

²⁴ Testimony of Derek Cutler on August 3, 2017, at 12:24.

²⁵ Testimony of Derek Cutler on August 3, 2017, at 12:12.

²⁶ *Whisenhunt v. State*, 2021 WL 5108493, at *6 (Alaska App., 2021) (“When deciding whether a motion for new trial based on the weight of the evidence should be granted, a trial court must take a ‘personal view of the evidence’ and independently weigh the evidence. The trial court must then ‘use its discretion to determine whether a verdict is against the weight of the evidence — not merely whether the trial court disagrees with the verdict — and whether a new trial is necessary ‘in the interest of justice,’ that is, ‘to prevent injustice.’”)

weakened by leaving a gap for a reasonable doubt to fill. The court uses the term “may” because, in each juror’s analysis corroborating evidence may elevate the probative value of somewhat ambiguous circumstantial evidence to proof beyond a reasonable doubt.

Under the prosecution’s theory, the most compelling evidence that Whisenhunt murdered Kempski is that (i) Whisenhunt’s semen was found on Kempski’s belt and his DNA under her fingernails, (ii) he denied any contact at any time with Kempski multiple times, which is obviously not true under either parties’ explanation, and (iii) Whisenhunt “knew” undisclosed details related to the homicide.

Here, the inferences drawn from the evidence by the prosecution are reasonably susceptible to differing inferences, and therefore, in the 13th juror’s analysis, raise a reasonable doubt include:

1. The only way sperm and DNA could be deposited under her fingernail and on her belt occurred when Whisenhunt killed her.
2. Only Whisenhunt stated that she was foot-stopped.
3. The unauthorized disclosure of pictures of the victim’s body did not give rise to rumors that she was face-stomped.
4. The state’s conclusion that the reason Whisenhunt lied about his acquaintance with Kempski was because he was trying to coverup his murder of her.

This court’s personal view is that the evidence and lack of evidence admitted at trial generated a reasonable doubt of Whisenhunt’s guilt. But the court cannot conclude that the guilty verdict is against the weight of the evidence. A new trial is not warranted.

Defendant’s DNA/Sperm Evidence Found on Victim

Whisenhunt’s DNA and semen on Kempski is solid evidence tying Whisenhunt with Kempski. The defendant’s explanation of the presence of the semen, first suggested during closing

argument, was that the semen was deposited on the victim at the Holiday store when the victim traded fellatio for drugs.

The Holiday store surveillance video establishes that Mr. Horner, Whisenhunt's mother's boyfriend, and the defendant arrived together in a vehicle at the Holiday store at 1:38:40 am on October 22, 2014.²⁷ Horner was driving.

At 1:39:40 Kempinski passes by the front doors of the store and in front of the silver pick-up truck in which Whisenhunt arrived. She does not appear in the video again.

The surveillance camera video establishes that Kempinski and Whisenhunt were at the station at the same time. But the video did not show contact between Kempinski and Whisenhunt.

The last time that Whisenhunt was seen in the video was 1:40:24.

The video shows Horner left the Holiday store in his vehicle at 1:54:34. Defense counsel offered an explanation in closing argument that during the 14-minute period at the Holiday store that Whisenhunt traded drugs for fellatio.

During the video, Horner came into the store three times for what appears to be coffee while apparently waiting for Whisenhunt. Whisenhunt cannot be seen leaving with Horner. But a reasonable inference is that Horner was waiting for Whisenhunt and they left the Holiday store together in Horner's vehicle.

Defendant's explanation of the deposit of the DNA and semen evidence is that he traded drugs for fellatio at the Holiday store. Horner appeared to be waiting for him for that 14-minute period. Horner was not called as a witness by the prosecution. According to Whisenhunt, the inference that Whisenhunt traded drugs for fellatio is to be drawn from (i) the 14-minute time

²⁷ Ex. 25.

period; (ii) Whisenhunt and Kempski being at the Holiday store at the same time; (iii) the victim's lifestyle and circumstances at the time were not inconsistent with the defendant's explanation as Kempski was homeless, destitute, and apparently with multiple sexual partners based upon the DNA test results; and (iv) the defendant's DNA under her fingernails and sperm on her belt. As a juror evaluating the above-listed circumstantial evidence, the inference drawn therefrom creates a possibility, but not a probability, the trade of fellatio for drugs occurred. Further, the circumstantial evidence is not strong enough to exclude other reasonable theories. Neither can the court as juror conclude that the inferred fact (the trade of fellatio for drugs) probably existed.

Finally, the analysis of the sperm found in Kempski's vagina cannot determine when the sperm was deposited by the three contributors.²⁸ The sexual activity resulting in the deposit of the sperm could have occurred during her abduction, but the science cannot determine when the sperm was deposited. But Whisenhunt was excluded as a contributor. That leaves an open question of whether the perpetrator or perpetrators is one or more of the three contributors.

The evidence and reasonable inferences drawn from the evidence raise a possibility, but not probability, that Whisenhunt's deposit of his semen and DNA on Kempski occurred at the Holiday store.

Blunt Force Trauma Rumors

Second, this court's personal view is that the investigation was compromised to a material extent by the unauthorized disclosure of pictures of the body to FCC inmates by a corrections officer. And those disclosures likely led to speculation and rumors that Kempski suffered blunt-force trauma or foot-stomping to the face and neck area. That speculation and rumors circulated at

²⁸ Testimony of Derek Cutler August 3, 2017, at 12:12.

FCC where Whisenhunt was incarcerated leading to the reasonable possibility that Whisenhunt's "unique crime information" was rumor-based. To the contrary, the state asserted, as key evidence uniquely tying Whisenhunt to the homicide, that only Whisenhunt stated she was stomped.²⁹

Though not directly involved in the investigation, the corrections officer was attempting to assist the investigation in identifying the victim by showing female inmates pictures of tattoos on the victim's body since the face was unrecognizable. Investigator Bressler, the lead investigator in the case, explained that the prospect of an early jail release for assisting in an investigation acts as an inducement to FCC inmates to fabricate reports to law enforcement. After the disclosure, law enforcement received "hundreds of calls" from the jail about the case each attempting to provide information for the investigation.³⁰

The pictures seen by the inmates showed that the entirety of Kempinski's facial tissue and the tissue on the front of the neck (including the trachea, esophagus, hyoid bone, tongue, and a portion of the eye) had been removed by birds scavenging over the ten-day period her naked body lay exposed.³¹ It is easy and reasonable to infer that such disturbing pictures could result in jailhouse rumors that her face was stomped.

The stomping narrative is one unsurprising variation of stories evolving from the unauthorized disclosure of pictures to FCC inmates. The inmates viewed the photos showing the body after 10 days of decomposition and with the face and the frontal neck tissue completely removed by scavenging birds.

²⁹ Testimony of Robert Bressler on August 9, 2017, at 10:02-10:03; 11:24-11:26; and Exhibit 201.

³⁰ Testimony of Robert Bressler on August 9, 2017, at 9:44-9:46.

³¹ Testimony of Cristin Rolfe on August 7, 2017, at 8:48-8:57 and 9:12. The medical examiner testified that all soft tissue was removed from the face and neck along with the trachea, esophagus, hyoid bone, tongue, and a portion of the eye.

The inferences drawn by the inmates viewing the shocking images could reasonably result in speculation and jailhouse rumors that the images resulted from blunt-force trauma to her head, throat, and neck occurred. This is contrary to the position of the prosecution that only the perpetrator would state that Kempinski had been foot-stomped. And the tip that Kempinski was stomped is not unique to Whisenhunt.

Bressler testified that Horman also told Bressler Kempinski was “stomped”.³² Other inmate “tips” to investigators said she was beaten, mutilated, raped, and gutted along with other acts.³³ It is just as likely that Whisenhunt’s source of the stomping statement evolved from inferences drawn from the description of the photos stated to him as compared to Whisenhunt’s perpetration of the crime itself.

The prosecution’s argument requires precisely defining the content of the rumors generated by the pictures of the body shown to inmates. In other words, the prosecution argues that the pictures generated rumors of gutting, mutilation, rape and more, could not reasonably generate rumors of stomping. As a juror, the court believes it is reasonable to conclude that the stomping account could also derive from comments of those viewing the photos.

The photo disclosure materially reduced or possibly eliminated law enforcement’s ability to identify the murderer through facts only known to the perpetrator. The evidence supports the conclusion that Whisenhunt did not have first-hand knowledge about the facts surrounding the homicide as the prosecution claimed. Instead, it is just as likely Whisenhunt’s disclosure to law enforcement was based upon jailhouse rumors motivated by self-interest. As a juror, the court would conclude a reasonable possibility exists that a source of the face-stomping statement from

³² Testimony of Robert Bressler on August 9, 2017, at 10:02-10:03 and 11:43-11:46.

³³ Testimony of Robert Bressler on August 9, 2017, at 9:36-9:40.

Whisenhunt was jailhouse rumors. So, the 13th juror's opinion is that Whisenhunt's statements about the face-stomping have little probative value.

Investigator Bressler addressed the issue of the integrity of the information gathered in the face of the picture disclosure in his testimony.³⁴ In short, Bressler believed that the showing of the dead-body images to the FCC female inmates did not result in rumors that the victim had been stomped in the face and neck. As a juror, the court would not reach the same conclusion.

Whisenhunt was at FCC and a recipient of the rumors. And, Whisenhunt later stated in 2016 that the source of his information was rumors.³⁵ Obviously, Whisenhunt would have motive to lie as a suspect (as would Horman), but, even so, as a juror the court would find that Whisenhunt's source of the stomping information could reasonably be jailhouse rumors.

A reasonable juror could interpret this evidence differently. Based upon his description of the murder, the jury could reasonably conclude that Whisenhunt knew not only "how" the crime was committed but also why. Whisenhunt told investigators that Kempinski panicked which made the perpetrator panic and kill her. Whisenhunt's statements could be reasonably understood as admissions to the crime based upon facts known only to the perpetrator.³⁶

Whisenhunt's Lies About Contact with the Victim

Finally, Whisenhunt's lies of this acquaintance with the victim could be explained by the defendant's desire to distance himself from the situation, but he also wanted to help himself in a probation violation case by disclosing information of the murder. While at first telling investigators that he knew specific information about the murder, Whisenhunt changed his story. In 2016,

³⁴ Testimony of Robert Bressler on August 9, 2017, at 9:15 & 9:31-; 9:44-9:47; 11:19-11:27.

³⁵ Bressler testimony on Aug. 8 at 12:52-53.

³⁶ *Whisenhunt v. State*, No. A-13240, 2021 WL 5108493, at *2 (Alaska Ct. App. Nov. 3, 2021), *aff'd on reh'g*, 504 P.3d 268 (Alaska Ct. App. 2022) ("He also told another person that the killer was a 'junkie' who got Kempinski really high and 'when she woke up in the middle of what he was doing, she freaked out,' and the junkie freaked out and killed her.").

Whisenhunt revised his story, stating the information was based upon jailhouse rumors. The source of the blunt-force trauma information disclosed by Whisenhunt could reasonably have been rumors at the jail generated by the disclosure of investigation information to inmates at FCC.

However, this fact is also subject to a different reasonable interpretation. Namely, that Whisenhunt lied about his contact with Kempinski to cover up his involvement in her murder notwithstanding his later claim that he, in fact, made up the story from the jailhouse rumors.

Horman

Horman was a legitimate suspect. The defendant's scenario that Horman committed the murder is not outlandish. The evidence that shortly before the murder Kempinski had an argument with Horman in which he threatened her life, that Horman's DNA was found inside of her, that the DNA of multiple males was detected in her vagina, the inability to identify the date of the deposit of the semen, and the need to more fully develop the evidence of Horman's location and activities on October 22 and 23, 2014, raise a reasonable doubt whether Whisenhunt is the responsible party.

On the other hand, Whisenhunt stated that Horman had nothing to do with this murder.³⁷ The jury may have taken Whisenhunt at his word. Moreover, the jury may have been suspicious of Whisenhunt's trial claim that Horman committed the murder, because during the investigation Whisenhunt stated he knew Horman, the alternative suspect, was innocent.

The Jury's Verdict Was Not Unjust

Even though the court disagreed with the verdict, the court finds the jury's verdict was not unjust. It is the jury's province to listen to the evidence, determine evidence credibility, and decide

³⁷ *Whisenhunt v. State*, No. A-13240, 2021 WL 5108493, at *2 (Alaska Ct. App. Nov. 3, 2021), aff'd on reh'g, 504 P.3d 268 (Alaska Ct. App. 2022) ("[h]e also said that Isaac Horman, who was a suspect at the time by virtue of his relationship with Kempinski, had nothing to do with her murder, adding: I know details about that shit that nobody knows. But the medical examiner and the police didn't investigate that shit.").

based upon the evidence presented. A reasonable juror could place a different amount of weight on the evidence of the jailhouse rumors relating to the issue of Whisenhunt's knowledge of the crime coming from either rumors or first-hand knowledge.

Whisenhunt's DNA under her fingernails and his sperm on her belt along with his false statements about his not knowing her is persuasive evidence. It was not unreasonable for a juror to reject Whisenhunt's defense explanation that he traded fellatio for drugs.

A juror could reasonably accept that Horman and Kempinski had a romantic relationship but the lack of evidence tying him to the actual murder lessened the plausibility of Horton committing the murder. Also, Investigator Bressler explained his efforts to tie Horman to the murder. The jury could reasonably find that Bressler's investigation was sufficient to relieve Horman of responsibility for the murder.

The issue of Whisenhunt's knowledge of the crime is likely viewed differently by the jury and the court as the 13th juror. Factfinders may reasonably differ on the relative believability or persuasiveness of evidence. The degree to which evidence convinces triers of fact to either accept or reject a factual assertion may reasonably differ. Plus, jurors have the benefit of deliberative discussions with the other jurors.

Based upon the evidence presented the jury could reasonably conclude that insufficient evidence supported the conclusion that Whisenhunt traded drugs for fellatio, that Bressler did a thorough job of obtaining and reviewing the evidence of Horton's conduct, and that the jailhouse rumors did not materially affect the ability of the investigation to determine that Whisenhunt "knew" facts about the body of the deceased that were confidential.

Whisenhunt claimed he did not know Janessa Kempinski and never had sex with her. That statement was plainly not true given that Whisenhunt's semen and DNA were found on Kempinski.

The jury could reasonably conclude that Whisenhunt consciously lied to the investigators which casts a serious doubt on the defense assertions in this case.

Jurors could reasonably find that Horman advised investigators he had a consensual sexual relationship with Kempiski with the last sex with her occurring the evening of the 21st of October and again the morning of October 22. Horman's cell phone data and Janessa's Facebook records tend to corroborate their relationship and contact. In addition, the jury could find that Bressler did a thorough job determining Horman's whereabouts in the early morning hours of October 23, 2014.

The court finds that the jury's verdicts are based upon a reasonable interpretation of the evidence and not unjust given the totality of the facts of the case.

In conclusion, the court finds that

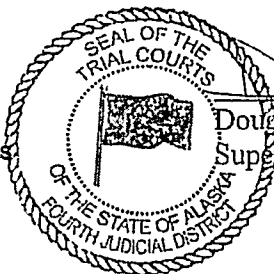
1. The court's conclusion sitting as the 13th juror is that the evidence and lack of evidence admitted at trial generates a reasonable doubt of Whisenhunt's guilt.
2. The jury's determination of guilt was not contrary to the weight of the evidence.
3. The interest of justice does not require a new trial.

IT IS ORDERED:

1. The motion for a new trial is DENIED.
2. The judgment must be amended to reflect a single conviction for second-degree murder.

Dated this 28th day of April, 2022.

I certify that on 5/2/22 copies of this
form were sent to: DA
CLERK: OPA



Douglas L. Blankenship
Superior Court Judge Pro Tem